

NO. 42901-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOANH NGUYEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. IT IS IMMATERIAL THAT THE AFFIDAVIT OF FRAUD MEETS THE FOUNDATIONAL REQUIREMENTS FOR A BUSINESS RECORD.

Nguyen does not dispute that the affidavit of fraud meets the business records exception to the general prohibition on hearsay. But the business records exception is utterly beside the point. There is no business records exception to the ban on opinions on guilt that invade the province of the jury. The business records exception resolves challenges based on hearsay rules. But it does not resolve concerns that the content of the statement contains an opinion on guilt that usurps the jury's role as factfinder:

It was never intended that, under the guise of a business record, the exception to the hearsay rule would be extended so that the maker of a record could express, through the medium of the record itself, an opinion as to causation that he would not be permitted to express in open court. . . . "The [uniform business records act] merely provides a method of proof of an admissible 'act, condition or event'. It does not make the record admissible when oral testimony of the same facts would be inadmissible."

Young v. Liddington, 50 Wn.2d 78, 84, 309 P.2d 761, 765 (1957) (quoting McGowan v. Los Angeles, 100 Cal. App. 2d 386, 392, 223 P.2d 862, 866, (1950)).

Frances Griffin would not have been permitted to give live testimony that she believed Nguyen was responsible for the fraud. To do so would

invade usurp the jury's role and violate Nguyen's constitutional right to have facts decided by an impartial jury. See, e.g., State v. Montgomery, 163 Wn.2d 577, 594-95, 183 P.3d 267 (2008) (direct opinion on core issue at trial was improper).

As the Young court explained, the business records exception was not intended to permit opinion testimony in the guise of a business record when the oral testimony would be prohibited. 50 Wn.2d at 84. Therefore, Nguyen's convictions should be reversed because the court erred in admitting this opinion on guilt, or, alternatively, because counsel was ineffective in failing to object to improper opinion that invaded the province of the jury and deprived his client of a fair trial.

2. THE AFFIDAVIT OF FRAUD WAS AN IMPERMISSIBLE DIRECT OPINION ON GUILT.

a. The Affidavit of Fraud Meets the Definition of an Impermissible Opinion on Guilt in *Demery*.¹

The State argues the affidavit of fraud is not an opinion on guilt because it was not a statement made under oath at trial. Response Brief at 12 (citing State v. Demery, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001)).

This argument should be rejected because an affidavit is a statement made under oath. According to Black's Law Dictionary, an affidavit is "A voluntary declaration of facts written down and sworn to by the declarant

¹ State v. Demery, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001)

before an officer authorized to administer oaths.” Black’s Law Dictionary (9th ed. 2009). The affidavit of fraud was a sworn statement that the witness believed Nguyen to be guilty of fraud.

While Frances Griffin did not testify live, her sworn statement was presented to the jury as proof of that very assertion. 1RP 281. This argument is merely another version of the business records argument and should be rejected for the same reason. Direct opinions on guilt do not suddenly become admissible when presented in the form of affidavits written down and sworn to before trial and then made part of a business record. Young, 50 Wn.2d at 84.

b. The Affidavit of Fraud Was an Explicit Statement of Belief that Nguyen Was Guilty of the Charged Offense.

The affidavit of fraud also meets the standard from Kirkman and Montgomery for manifest constitutional error because it is an explicit statement of belief in guilt. Montgomery, 163 Wn.2d at 591; State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007). The State’s discussion of State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), is inapposite.

Jones involved two statements challenged as impermissible opinions. First, a Child Protective Services caseworker testified she told the young molestation victim, “I believe you.” 71 Wn. App. at 812. The court

concluded that, when the context of the statement was considered, it was not an expression of belief, but a statement of reassurance meant to encourage the child to respond. Id.

Similarly to Jones, in State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011), a police officer's statement, made during an interrogation, that he did not believe the defendant, was held not to constitute improper opinion testimony. The prosecutor in Notaro asked the detective how he reacted to Notaro's initial version of events given during a police interrogation. The detective testified, "I told him I didn't believe him." 161 Wn. App. at 664. The prosecutor then asked if Notaro changed his story and what he did that prompted the change. 161 Wn. App. at 665. The detective answered, "I leaned forward and I told him I didn't believe him." 161 Wn. App. at 665.

On appeal, the court described the statements as "tactical interrogation statements," that were "designed to challenge the defendant's initial story and elicit responses." 161 Wn. App. at 669. Under these circumstances, the court held the detective was not actually expressing a personal belief and the jury was adequately informed of that fact. Id. at 669.

In both Jones and Notaro, statements that appeared to give an opinion on credibility were not deemed to be such, given the circumstances under which they were made. In each case, the statement was made for a

purpose other than actually declaring belief – in Jones, to reassure, thereby inducing disclosure, and in Notaro to challenge, thereby inducing a change in story. In this case, there was no other purpose for Frances Griffin’s statement. She was not trying to dupe or reassure the bank employee or elicit any specific response from her. The affidavit is Griffin’s statement of belief that Nguyen was guilty and was presented to the jury as proof of that assertion.

The second statement at issue in Jones troubled the court much more. 71 Wn. App. at 813. The same caseworker testified, “I felt that this child had been sexually molested by [Jones]. Id. at 812. The court concluded the statement, “plainly indicated her opinion that she believed Jones had molested A.” Id. at 813. Therefore, the court held, “admission of this statement was error. This error is of constitutional magnitude because it invades the province of the jury.” Id.

This second statement from Jones is much more similar to Frances Griffin’s sworn statement that she believed Nguyen was responsible for the fraud. Ex. 11; Jones, 71 Wn. App. at 812. As in Jones, the statement was a direct opinion on guilt, and its admission was constitutional error. Id.

c. The Affidavit of Fraud Was Inadmissible Under ER 704 Because It Was Not Based on the Perceptions of the Witness.

The State correctly points out that opinions are not necessarily objectionable merely because they cover an ultimate issue of fact. ER 704. But lay opinions must be rationally based on the witness's perceptions. ER 701. For example, in State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999), a trooper testified the defendant, charged with attempting to elude, "was attempting to get away from me and knew I was back there and refusing to stop." Id. at 458. The court held the testimony was not admissible as expert opinion because the officer was not an expert on the defendant's state of mind. Id. at 461. The court also concluded the testimony was not helpful to the jury because the jury was fully capable of drawing inferences about the driver's state of mind based on her conduct without assistance. Id. at 461-62.

The court in Farr-Lenzini also explained that, when the opinion relates to a core issue in the trial, the factual basis for the opinion must be even more substantial. Id. at 462-63. The court found the trooper's opinion on Farr-Lenzini's state of mind was without sufficient factual basis. Id. at 465.

As in Farr-Lenzini, Griffin's opinion that Nguyen was responsible for the fraud was not sufficiently grounded in facts she actually perceived.

The affidavit does not say, for example, that she identified Nguyen's handwriting, or that Nguyen had access to the checkbook. Ex. 11. The affidavit states her opinion that Nguyen was guilty with no factual basis whatsoever. Ex. 11.

The State cites to State v. We, 138 Wn. App. 716, 158 P.3d 1238 (2007) for the proposition that ER 704 mandates admission of this direct opinion on guilt. Response Brief at 16. But We is inapposite. The opinion in We was that of an expert arson investigator. 138 Wn. App. at 720. He opined We started the fire and her motive was to collect the insurance proceeds. Id. at 724. On appeal, the court concluded this was a proper expert opinion because the arson investigator was qualified to offer an opinion on the cause and motive for a fire. Id. at 725-26. Even so, a strong dissent by Judge Schultheis would have held the testimony improper because it went beyond opinion on a factual issue and amounted to an opinion on guilt. Id. at 730-34 (Schultheis, J., dissenting). Frances Griffin, by contrast, was not an expert investigator. She was in no way qualified to offer expert testimony that would have helped the jury analyze the facts. As in Farr-Lenzini, the jury is equally capable of drawing inferences from the evidence presented in this case. 93 Wn. App. at 461-62. Admission of this evidence, regardless of ER 704, was constitutional error. Id. at 465.

3. THE STATE CANNOT SHOW THIS CONSTITUTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Constitutional error is presumed prejudicial unless “no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105 (1988). Based on Nguyen’s reasonable explanations for three of the checks, a rational juror could have entertained a doubt and his convictions must be reversed.

The State argues the jury’s decision on credibility must stand. Response Brief at 17. That would be correct if the jury’s decision had not been unfairly influenced by improper opinion testimony. The prosecutor relied on the improper opinion in closing and the jury’s inquiry indicated it did so as well. 1RP 281. The jury specifically asked for a similar affidavit for one of the other checks and asked if there was a reason it was not completed. CP 148. Nguyen’s right to a fair trial demands that he be afforded an impartial jury, whose credibility decisions remain untainted by improper opinion testimony. See State v. Johnson, 152 Wn. App. 924, 933-34, 931, 219 P.3d 958 (2009) (reversing because testimony that defendant’s wife believed the allegations against him could only serve to prejudice the jury).

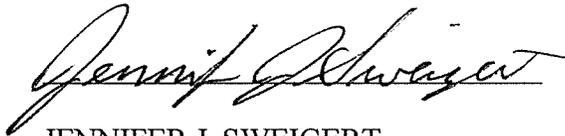
B. CONCLUSION

For the foregoing reasons and for the reasons cited in the opening Brief of Appellant, this Court should reverse Nguyen's convictions.

DATED this 6th day of September, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert". The signature is written in black ink and is positioned above the printed name.

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DOANH NGUYEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DOANH NGUYEN
DOC NO. 354044
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF SEPTEMBER 2012.

X 

NIELSEN, BROMAN & KOCH, PLLC

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